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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND and
CONNIE J. ENGLAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE RESPONDENT

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In the petition for a writ of certiorari, petitioners emphasized that the tax treatment of employer-reimbursed moving expenses affects hundreds of thousands of employees annually, and that many thousands of these employees may be irreparably damaged unless this Court resolves the issue promptly (Pet. 6-12). Respondent does not question this statement. Indeed, respondent has explicitly conceded the widespread effect and importance of this case (Resp. 8). Nevertheless, respondent has urged this Court to deny the petition.

1. Respondent's principal argument is that the Commissioner of Internal Revenue "validly exercised" his rule-making power in ruling that certain reimbursed expenses are includible in income as a matter of law (Resp. 8).[1] This argument has two deficiencies.

[1]Respondent also states that the Commissioner's rules date back to Rev. Rul. 54-429, 1954-2 C. B. 53. In fact, Rev. Rul. 54-429 only incidentally dealt with the includibility in income of reimbursed expenses of the type here involved, and the Tax Court in *John E. Cavanagh* was uncertain whether it was agreeing or disagreeing with the ruling. See 36 T. C. 300, 304 (1961). Only after the decision in the Court of Appeals below did the Commissioner publish an unequivocal ruling on the subject. Rev. Rul. 65-158, I. R. B. 1965-24, 6.

First, the argument ignores the fact that the Commissioner's ruling has "no more binding or legal force than the opinion of any other lawyer." *United States* v. *Bennett,* 186 F. 2d 407, 410 (5th Cir. 1951); *Kaiser* v. *United States,* 262 F.2d 367, 370 (7th Cir. 1958), *aff'd,* 363 U. S. 299 (1960).[2] And like the opinion of any other lawyer, the Commissioner's ruling does not eliminate the need for definitive guidance from this Court.

Secondly, the Commissioner's ruling position is arbitrary—and wrong. It would treat reimbursements for certain expenses as excludable from income—because incurred primarily for the benefit of the employer—while treating reimbursements for other expenses as includible—although similar in nature and likewise incurred primarily for the employer's benefit. No such arbitrary rule can be justified in the name of administrative convenience. There is no reason why here, as in other areas of tax law, the application of governing criteria to particular reimbursements should not properly be left to the income tax audit process. The function of this case is to establish such governing criteria.

2. Respondent suggests that appellate courts in addition to the Court of Appeals below have considered the issue herein presented, but such is not the case. Of the decisions cited by respondent, *United States* v. *Woodall,* 255 F. 2d 370 (10th Cir.), *cert. denied,* 358 U. S. 824 (1958); and *Koons* v. *United States,* 315 F. 2d 542 (9th Cir. 1963), involved reimbursed moving expenses of new employees. *Bradley* v. *Commissioner,* 324 F. 2d 610 (4th Cir. 1963), involved reimbursement to a new employee for a loss on the sale of his house. Since a move by a new employee is not made at the direction and in the interest of the employer, reimbursements to new employees have always been con-

[2] See also *Biddle* v. *Commissioner,* 302 U. S. 573, 582 (1938).

sidered taxable.[3] *Commissioner* v. *Mendel,* 4th Cir. No. 9904, decided October 8, 1965, and *York* v. *Commissioner,* 160 F. 2d 385 (D. C. Cir. 1947) dealt with the deductibility of unreimbursed moving expenses, an issue far different from the includibility in income of reimbursed moving expenses. See Rev. Rul. 54-429, 1954-2 C. B. 53. And *Light v. Commissioner,* 310 F. 2d 716 (5th Cir. 1962), was a *per curiam* affirmance of a Tax Court decision argued and decided on the question of whether reimbursed expenses which taxpayer included in income were deductible by him as travel expenses while away from home.[4]

3. Respondent also suggests that it was the implicit intent of Congress when it added section 217 to the 1954 Code that reimbursed expenses of the type present here and in *John E. Cavanagh*[5] should be includible in income. Such suggestion cannot stand up in view of the fact that Congress expressly acknowledged existence of the *Cavanagh* decision and stated that the extent of "the exclusion for *existing* employees . . . is left for judicial interpretation"[6] (emphasis added).

4. Respondent rejects the existence of any appellate conflict here involving interpretation of the word "home" as used in section 162(a)(2) of the 1954 Code, because the context in which the issue was presented in this case differed from the circumstances of other cases. However,

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[3]*Compare* Rev. Rul. 54-429, 1954-2 C. B. 53, *with* Rev. Rul. 55-140, 1955-1 C. B. 317 and Rev. Rul. 59-236, 1959-2 C. B. 234.

[4]The suggestion that the reimbursed expenses should not have been included in income was presented only in a supplemental brief filed in the Court of Appeals to ask that the case be remanded for a determination of whether the expenses reimbursed were "extraordinary" within the *Cavanagh* doctrine. The Court of Appeals apparently viewed the issue as not timely raised and did not deal with it.

[5]36 T. C. 300 (1961).

[6]S. Rep. No. 830, 88th Cong., 2d Sess. 71-72 (1964); H. R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).

the situations in which this issue arises generally vary. The significant fact is that the Court of Appeals below held that a taxpayer's "home" is necessarily his place of business; other courts of appeals have disagreed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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